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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COLUMBUS, GEORGIA,

Petitioner,

versus

DONALD R. JONES, JAMES DUNNAVANT, BRENT S. MORRIS, Individually and on behalf of all others similarly situated,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Eugene Hardwick Polleys, Jr.
(Counsel of Record)
City Attorney
P.O. Box 1340
Columbus, Georgia 31902
(706) 653-4025
Ga. State Bar No. 583000
Attorney for Columbus, Georgia

CASILLAS PRESs • 1717 K STREET, N.W. • WASHINGTON, D.C. 20006 • 1-800-947-2650

62 pp

QUESTIONS PRESENTED FOR REVIEW

1.

Has the Eleventh Circuit changed the standards of Rule 56(c) of the Federal Rules of Civil Procedure allowing summary judgments as established in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317, (1986) by allowing Plaintiffs-Respondents to withstand Defendant's Motion for Summary Judgment despite the uncontroverted facts submitted by Defendant-Petitioner entitling Defendant to summary judgment to which Plaintiffs submitted no factual response whatsoever as required by Rule 56(e) and by requiring the District Court to make findings of fact in order to justify its grant of summary judgment to Defendant?

2.

Has the Eleventh Circuit allowed an unauthorized continuance of discovery in violation of Rule 56(f) of the Federal Rules of Civil Procedure by both ignoring the facts of record showing that Defendant-Petitioner had promptly responded to all of Plaintiffs-Respondents' discovery requests and by not requiring Plaintiffs to file a necessary affidavit showing the reason Plaintiffs filed no timely response to Defendant's Motion for Summary Judgment or what facts Plaintiffs would produce as a result of further discovery?

3.

Has the Eleventh Circuit improperly vacated a summary judgment and remanded a Fair Labor Standards Act case to the District Court and thereby ignored Rule 1006 of the Federal Rules of Evidence which allows summations of voluminous documents to be introduced into evidence and the

rules of evidence which allow consideration of affidavits and other material for summary judgments when opposing parties neither interpose objections thereto or file motions to strike and never raise any issue as to the admissibility or relevance thereof until appeal?

4.

Has the Eleventh Circuit overlooked the undisputed factual record which shows compliance with FLSA partial exemption requirements of 29 U.S.C. § 207 (k) for classifying emergency medical technicians as having duties substantially related to firefighting defined by 29 CFR §§553.212, 553.215, and 553.230 as held in *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991), *Justice v. Metropolitan Government of Nashville, Davidson County, Tennessee*, 4 F.3d 1387 (6th Cir. 1993), and *Christian v. City of Gladstone, Mo.*, 108 F.3d 929 (9th Cir. 1977)?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Besides the Defendant-Petitioner Consolidated Government of Columbus and Muscogee County, Georgia, created by the laws of the State of Georgia with the official corporate name of "Columbus, Georgia" and commonly known as "the City," the Plaintiffs-Respondents are various members of the Columbus Emergency Medical Service whose names are footnoted below[1] as they were recorded in the attachment to their Notice of Appeal which took their case from the District Court to the Court of Appeals. Neither the City Attorney nor the Assistant City Attorney (Clifton C. Fay who is not a participant in this case but who is, like the City Attorney, employed

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[1] 1. Nathan S. Bader
2. Gregory Thomas Burnette
3. Paula K. Carter
4. Jerry C. Clayton
5. Carl Lee Dunn, Jr.
6. Joseph Timothy Edge
7. Darrell R. Enfinger
8. Rosmarie E. Feeback
9. Ralph J. Fuller, Jr.
10. Jules V. Hazen, III
11. Donald Johnson
12. Donald R. Jones
13. NOrma G. Kernels
14. Debra Lynn Martin
15. William P. Moore
16. Brent S. Morris
17. Brice W. Patterson
18. Cynthia D. Shoemaker
19. Monica A. Swank
20. Joe A. Wall
21. James H. Wheeler
22. Charles W. Borders
23. Otis G. Bussey
24. Billy Wayne Cherry
25. Joey C. Cureton
26. James Dunnavant
27. Nolan Dwight Eldridge
28. Rodney K. Eldridge
29 Thomas J. Faulkner
30. Timothy W. Franklin, Jr.
31. Floyd Webster Harris, Jr.
32. Mike Higgins
33. Rhonda R.Johnson
34. James Larry Keaton
35. William Thomas Kernels
36. Gary Netcalf
37. Joseph L. Morgan
38. Susan P. Olson
39. Dennis W. Peterson
40. Christopher J. Springer
41. Aubrey T. Todd
42. Jeffrey Scott Ward
43. Henry Freeman Worley

by the City) has any financial interest in the outcome of this case. Attorneys for the Respondents are identified in the Certificate of Service, and the judges below are identified in the decisions attached in the appendix.

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES

The decision of the Eleventh Circuit Court of Appeals from which Petitioner seeks review is reprinted in the appendix and is reported at 120 F.2d 248 (11th Cir. 1997). The decision of the U.S. District Court for the Middle District of Georgia which produced the appeal to the Eleventh Circuit is also reprinted in the appendix but is not reported. The District Court's decision reprinted in the appendix is supplemented by two orders denying Plaintiff's attempts to indefinitely delay discovery.

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PETITION FOR A WRIT OF CERTIORARI

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The U. S. Court of Appeals for the Eleventh Circuit rendered an opinion on August 26, 1997 vacating and remanding a decision of the U.S. District Court for the Middle District of Georgia, and Plaintiff moved for rehearing and suggested rehearing en banc on September 5, 1997. Petition for Rehearing and Suggestion for Rehearing En Banc was denied on December 22, 1997, and this Petition is filed within 90 days

of said denial. The statutory provision believed to confer jurisdiction upon the Supreme Court to review the judgment or decree of the Court of Appeals by writ of certiorari is 28 U.S.C. § 1254 (1) (102 Stat. 202).

As to the first question presented for review involving Rule 56 (c) and Rule 56 (e) of the FRCP, the Court of Appeals has rendered a decision contrary to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* 475 U.S. 574 (1986), *Lujan v. National Wildlife Federation*, 497 U. S. 871 (1990), *Milton v. Van Dorn Co.*, 961 F.2d 965 (4) (1st Cir. 1992), *State Farm Life Insurance Company v. Gutterman*, 896 F.2d 116 (2) (5th Cir. 1992), *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (3) (5th Cir. 1992), *Tolle v. Carroll Touch, Inc.*, 23 F.3d 174, 178 (7th Cir. 1994), *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 344 (8th Cir. 1988), and *DeHorney v. Bank of America National Trust and Savings Association*, 879 F.2d 459, 464 (9th Cir. 1989). These decisions would require a different result because the City submitted affidavits and other evidentiary material to which the EMS employees did not respond at any time with any affidavit or other evidentiary material and upon which the District Court entered a summary judgment with a recitation of facts, even though no such recitation is required.

As to the second question presented for review involving Rule 56(f) of the FRCP, the Court of Appeals has rendered a decision contrary to *Celotex Corp. v. Catrett*, 477 U.S. 317, (1986), *McCloud River R. Co. v. Sabine River Forest*, 735 F.2d 879 (1) (1984), *Sage Realty Corp. v. Insurance Company of North America*, 34 F.3d 124, 128 (2d Cir. 1994), *Exxon Corp. v. Crosby-Mississippi Resources, Ltd.*, 40 F.3d 1474, 1487, 1488 (5th Cir. 1995), *Klepper v. First American Bank*,

916 F.2d 337, 343 (6th Cir. 1990), *Allen v. Bridgestone/Firestone Inc.*, 81 F.3d 793, 797, 798 (8th Cir. 1996), *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 920, 921 (9th Cir. 1996), *Boling v. Romer*, 101 F.3d 1336, 1339 (Footote 3) (10th Cir. 1996); and *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed. Cir. 1996). These decisions would require a different result because the District Court could not have abused its discretion in not allowing the EMS employees a continuance for further discovery in view of the fact that the City answered all of the EMS discovery requests that were filed prior to the expiration of the extended time allowed for responding to the City's Motion for Summary Judgment and by the further fact that the EMS employees never at any time filed a required affidavit showing the need or reason for extending discovery nor made any showing of what evidence any further discovery would disclose.

As to the third question presented for review involving Rule 1006 of the Federal Rules of Evidence allowing summations in charts or other documents as long as underlying data is identified and made available and the requirement that an objection or motion to strike is required to be made in opposition to evidence in the District Court and may not be made for the first time on appeal as was done by the EMS employees, the Court of Appeals has rendered a decision contrary to *Davis v. Sears, Roebuck and Company*, 708 F.2d 862 (1) (1st Cir. 1983), *Decintio v. Westchester County Medical Center*, 821 F.2d 111 (2) (2nd Cir. 1987), *U.S. v. Strissel*, 920 F.2d 1162, 1163, 1164 (4th Cir. 1990), *McCloud River R. Co. v. Sabine River Forest*, 735 F.2d 879 (1) (5th Cir. 1984), *Klingman v. National Indemnity Co.*, 317 F.2d 850, 854 (7th Cir. 1963), and *Noblett v. General Electric Credit Corporation*, 400 F.2d 442, 445 (10th Cir. 1968), cert. den., 393 U.S. 935. The opinion of the District Court as well as the undisputed factual record

records these errors albeit the opinion of the Court of Appeals fails to point out any such facts.

As to the fourth question presented for review involving interpretation of the FLSA so as to require classification of the Columbus EMS employees as being partially exempt from overtime provisions under 29 U.S.C. § 207 (k), the Court of Appeals has rendered a decision contrary to *Bond v. City of Jackson*, 939 F.2d 285 (5th Cir. 1991), *Justice v. Metropolitan Government of Nashville, Davidson County, Tennessee*, 4 F.3d 1387, 1395, 1396, 1399 (6th Cir. 1993), and *Christian v. City of Gladstone, Mo.*, 108 F.3d 929, 934 (9th Cir. 1977), in that the Court of Appeals overlooks the undisputed facts of record, ignores significant findings of fact and conclusions of law embodied in the four-page Memorandum Opinion and Order of the District Court, and erroneously declares that the following sentence of what it describes as a "brief order" is the *only* evidentiary consideration made by the District Court — an obvious factual distortion of the District Court's meaning and a plainly wrong legal conclusion because the sentence, standing alone, would justify summary judgment: "The calculation of man hours reflected in the affidavit of the EMS Chief in this case and the work analyses indicated by the affidavit of the Assistant EMS Chief clearly show that the City of Columbus has properly arrived at the conclusion that its EMS Department spends the majority of its exempt time on fire protection and that the overtime hours applicable to fire fighters governs the Plaintiffs' compensation." 120 F.3d 248, 254.

STATUTES AND RULES INVOLVED IN THE CASE

1. 29 U.S.C. § 207 (k):

"Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if —

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears he same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed."

2. 29 CFR § 553.212 (a)

"Employees engaged in fire protection or law enforcement activities as described in §§ 553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than 20 percent of his/her working time in non exempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part."

3. 29 CFR § 553.215 (a)

"Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires,

crime scenes, riots, natural disasters and accidents. As provided in § 553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period."

4. 29 CFR § 553.230(a):

"For those employees engaged in fire protection activities who have a work period of at least 7 but less than 28 consecutive days, no overtime compensation is required under section 7(k) until the number of hours worked exceeds the number of hours which bears the same relationship to 212 as the number of days in the work period bears to 28."

5. Rule 56(c) of the Federal Rules of Civil Procedure:

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

6. Rule 56(e) of the Federal Rules of Civil Procedure:

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

7. Rule 56(f) of the Federal Rules of Civil Procedure:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

8. Rule 1006 Federal Rules of Evidence:

"The contents of voluminous writings, recordings, or photographs which cannot conveniently be exam-

ined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court."

STATEMENT OF THE CASE

Plaintiffs filed their FLSA Complaint against Defendant on July 6, 1995 (R1—1), and Defendant answered on July 28, 1995 (R1—4). Plaintiffs filed a Request for Production of Documents on September 6, 1995 (R1—5), and Defendant responded on October 4, 1995, either providing copies to Plaintiffs or informing Plaintiff how and where documents could be obtained (R1—7). Plaintiffs filed Interrogatories on October 2, 1995 (R1—6), and Defendant responded on October 26, 1995 (R1—8). Defendant filed its Motion for Summary Judgment and supporting Affidavits and Brief and Statement of Undisputed Material Facts on November 20, 1995 (R1—9-14,40), and Plaintiffs never filed any counteraffidavits or any statement of disputed facts or brief or any other response thereto within the 20 days prescribed by Rule 3.2 of the Middle District of Georgia or within the updated time for response of December 27, 1995 (recorded in record as having been entered on December 11, 1995) but rather relied solely on an unsworn document styled as Plaintiffs' Motion to Hold in Abeyance Defendant's Motion for Summary Judgment and Brief in Support thereof which contains or attaches no affidavit and no evidentiary material whatsoever and which argues that a summary judgment should not be granted in light of certain FLSA cases and which states the obvious (that depositions have not been taken) without stating why or what Plaintiffs have been doing during the six months that their lawsuit has been pend-

ing and without bothering to even suggest a time limit for the requested indefinite abeyance. (R1—16) Plaintiffs also filed a Second Request for Production of Documents on December 21, 1995 (R1—15), and Defendant responded on December 29, 1995 by telling Plaintiffs that all of the papers requested (consisting of documents cited by Chief Arrington in his November 20 Affidavit as being in the EMS office or in Data Processing (R1—13)) were still available in said places including the individual shift reports that were on the payroll records that were in the EMS office, that had been previously requested by Plaintiffs, but that had never been "picked up by Plaintiffs" (R1—18). The District Court denied abeyance on April 22, 1996 (R1—24), sustained Defendant's objections to Plaintiffs' taking untimely depositions on April 22, 1996 (R1—25), and granted Defendant's Motion for Summary Judgment on May 2, 1996 (R1—27). After reconsideration was denied by the District Court on May 20, 1996 (R1—36), Plaintiffs appealed on May 23, 1996 (R1 37).

The 40 or so Plaintiffs in this action are employees of Defendant's Emergency Medical Services Division who hold ranks up to the grade of lieutenant and who work shifts of 24 hours on and 48 hours off for 56-hour weeks, and they claim overtime for all hours in excess of 40 hours per week. (R1—1) Defendant pays them three hours per week overtime because they qualify for partial FLSA exemption in that their activities are substantially related to fire protection. (R1—4)

Plaintiffs have been classified as engaging in fire protection for the following reasons:

(a) Plaintiffs are trained in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and this training includes extrication techniques or freeing victims from

imminent danger by the most expeditious means using special equipment such as the "jaws of life" and includes also life-saving and life-support procedures; such training is either a prerequisite to employment or a part of Plaintiffs' continuing education after employment. (R1—11)

(b) Plaintiffs are regularly dispatched to fires, crime scenes, riots, natural disasters, and accidents in all situations in which Columbus EMS personnel are needed to assist the Fire Department or the Police Department in situations wherein there is a need for rescue work, including extrication from cars, or assistance to victims of crimes or fires, including law enforcement or fire protection personnel, or where accidents pose a threat of fire or explosion. (R1—40)

(c) Counting waiting time, over 80% of Plaintiffs work time is spent on police or fire related calls. (R1—13)

(d) When fire activities and police activities are weighed together, the majority of Plaintiffs' time spent on these exempt calls is classified as related to fire protection. (R1—13)

(e) Vehicular accidents serious enough to cause injuries involve the potential for fire or explosion, and the Columbus Fire Department and the Columbus EMS respond simultaneously to such accidents as a matter of policy; this policy is based upon studies of the dangers of and potential for fire or explosions in connection with vehicular accidents. (R1—12)

(f) The EMS department head has monitored relevant authorities and sought appropriate advice from the Department of Labor in assisting Defendant to make the FLSA classification about which Plaintiffs complain. (R1—13)

(g) *All* emergency calls from *all* citizens of Columbus, Georgia and Muscogee County are received at Defendant's 911 Center, and there is no other emergency medical service

in the Columbus-Muscogee geographical area maintained by any other governmental unit or other entity (except an arrangement with private ambulances in the event that all of Defendant's ambulances are already engaged). (R1—40) This is not surprising in view of the fact that Defendant is a consolidated city-county government consisting of the former entities known as the City of Columbus and Muscogee County. 1971 Ga.L., Extra.Sess., 2007.

ARGUMENT AND AUTHORITIES

1. RULE 56(c) and RULE 56(e)

Encouragement for use of summary judgment was brought about by *Celotex, Anderson,* and *Matsushita,* followed later by *Lujan*. Recognition of this is found in two respectable treatises:

> "Taken together the three cases signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials." Federal Practice and Procedure § 2727 Wright, Miller, & Kane

> "Courts and commentators quickly perceived the trilogy as ushering in a 'new era' for more favorable judicial attitudes toward summary judgment." Moore's Federal Practice § 56.03 [1]

The beginnings of the present problem presented for review are seen in *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991), relied upon by the opinion in the case at bar. The panel in *Clark,* like the present panel, appears to treat the trio of leading cases somewhat more casually than do the foregoing astute commentators and the District Court: "Of the three, *Celotex* is the most notable, not because it signif-

icantly changed summary judgment law, but because it is so commonly misunderstood and misapplied." 929 F.2d 604, 607. As recognized by the District Court, these Supreme Court cases mandate that Rules 56(c) and 56(e) are to be taken to heart by litigants and lower courts because they mean what they say. As indicated in Footnote 6 of *Anderson*, the Supreme Court specifically refrains from requiring findings of fact in summary judgments, but the Eleventh Circuit appears to have embarked upon a contrary course of requiring such findings of fact in a procedure that superimposes Rule 52 of the FRCP upon summary judgment procedure without the deference afforded to trial judges in such cases as *Pullman-Standard v. Swing*, 456 U.S. 273 (1982), and *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844 (1982), requiring review under a clearly erroneous standard — much less the general deference afforded to trial judges in *Kennedy v. Silas Mason Company*, 334 U.S. 249, 256 (1948), a review of an FLSA summary judgment disposition: "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine."

The following decisions from other circuits illustrate the error in the Eleventh Circuit and suggest the need for corrective action by the Supreme Court:

(a) *Milton v. Van Dorn Co.*, 961 F.2d 965 (4) (1st Cir. 1992):

> "Party seeking summary judgment is entitled to judgment as matter of law if nonmoving party does not adduce enough evidence to permit reasonable trier of fact to find for nonmoving party on element

essential to its claim; party with burden of proof must produce more than scintilla of evidence on each essential element."

(b) *State Farm Life Insurance Company v. Gutterman*, 896 F.2d 116 (2) (5th Cir. 1992):

"To defeat properly supported motion for summary judgment, nonmoving party must bring forward 'significant probative evidence'; this may be equated with 'substantial evidence' standard used to determine whether directed verdict is appropriate."

(c) *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (3) (5th Cir. 1992):

"Once party moving for summary judgment establishes there is absence of genuine issues of material fact, nonmovant must establish each of challenged essential elements of its case for which it will bear burden of proof at trial, which it may do by tendering depositions, affidavits, and other competent evidence, but not mere conclusory allegations."

(d) *Tolle v. Carroll Touch, Inc.*, 23 F.3d 174, 178 (7th Cir. 1994):

"Moreover, to preclude summary judgment the disputed facts must be those that might affect the outcome of the suit, *First Indiana Bank v. Baker*, 957 F.2d 506, 508 (7th Cir. 1992), and a dispute about a material fact is 'genuine' only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)."

(e) *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 344 (8th Cir. 1988):

> "Appellants, who would ultimately have the burden of proof at trial, have failed to 'go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'' *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(e)).*"

(f) DeHorney v. Bank of America National Trust and Savings Association, 879 F.2d 459, 464 (9th Cir. 1989):

> "Citing *Steckle v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983), the district court held DeHorney failed to produce 'Specific facts' showing that there was a genuine issue for trial. Fed.R.Civ.P. 56(e). *Steckle* follows the well established rule with respect to the burden of proof in a summary judgment motion. The initial burden of showing the absence of a material factual issue is on the moving party. Once that burden is met, the opposing party must come forward with specific facts, and not allegations, to show that a genuine factual issue remains for trial."

2. RULE 56(f)

Celotex cites Rule 56(f) as the proper remedy for dealing with premature motions for summary judgment. Again, as in its application of Rules 56 (c) and 56 (e), the Supreme Court concludes without equivocation that words mean what they say: Footnote 6 quotes Rule 56 (f) verbatim, and nothing in the text of the opinion qualifies its plain language that an affidavit is required to invoke its use and that specific reasons be recited therein. The Court of Appeals in this case does not even bother to cite Rule 56 (f), much less apply its provisions.

The following decisions from other circuits indicate that they have taken to heart the requirements of Rule 56(f) and the requirement that review of district courts is made under an abuse of discretion standard:

(a) *Sage Realty Corp. v. Insurance Company of North America*, 34 F.3d 124, 128 (2d Cir. 1994):

> "INA's assertion that it was entitled to discovery under Fed.R.Civ.P. 56(f) to defend against Sage's motion for summary judgment is equally without merit. Rule 56(f) requires the opponent of a motion for summary judgment who seeks discovery to file an affidavit explaining: (1) the information sought and how it is to be obtained; (2) how a genuine issue of material fact will be raised by that information; (3) what efforts the affiant has made to obtain the information; and (4) why those efforts were unsuccessful. *See Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 422 (2d Cir.1989). Additionally, the discovery sought must be material to the opposition of the summary judgment motion. *See id.*"

(b) *Exxon Corp. v. Crosby-Mississippi Resources, Ltd.*, 40 F.3d 1474, 1487, 1488 (5th Cir. 1995):

> "We agree with the district court that CMR's request for an extension of discovery was merely a request by CMR to conduct a fishing expedition. Thus, we uphold the district court's denial of CMR's request for additional discovery. *Robbins v. Amoco Prod. Co.*, 952 F.2d 901, 907 (5th Cir.1992) (upholding the district court's denial of a motion for additional discovery because the party's request 'contains only the vague assertion that additional

discovery is needed'); *Paul Kadair, Inc. v. Sony Corp. of Am.*, 694 F.2d 1017, 1030 (5th Cir. 1983) (noting that Rule 56(f) cannot be relied upon to defeat a motion for summary judgment 'where the result of a continuance to obtain further information would be wholly speculative')."

(c) *Klepper v. First American Bank*, 916 F.2d 337, 343 (6th Cir. 1990):

> "Klepper had the burden of showing, by affidavit, why he was not able to oppose the motion for summary judgment. *Emmons v. McLaughlin*, 874 F.2d 351, 357 (6th Cir. 1989). Klepper failed to meet his burden by not presenting any affidavit as required under Rule 56(f)."

(d) *Allen v. Bridgestone/Firestone, Inc.*, 81 F.3d 793, 797, 798 (8th Cir. 1996):

> "As the party opposing the motion for summary judgment, Allen can request that the district court delay ruling on the motion until the completion of additional discovery. Fed.R.Civ.P. 56(f). Under Rule 56, Allen may submit an affidavit stating the reasons that he cannot present facts essential to justify his opposition. *Id.* Upon the filing of such an affidavit, 'the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.' *Id.* We review the denial of a request for discovery under Rule 56(f) for an abuse of discretion. *See Waible v. McDonald's Corp.*, 935 F.2d 924, 926 (8th Cir.1991) (per curiam).
>
> To fall under the protection of Rule 56, a party

must articulate what additional discovery is necessary and how it is relevant to the opposition of the pending motion for summary judgment. We have noted that a party who invokes the protection of Rule 56(f)

> must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.

Willmar Poultry Co. v. Morton-Norwich Prods., Inc., 520 F.2d 289, 297 (8th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S.Ct. 1116, 47 L.Ed.2d 320 (1976). In the present case, Allen asserted that certain interrogatories remained unanswered and that he had not yet deposed the district manager. Allen failed, however, to demonstrate how any of this discovery would be relevant in helping him establish that he was constructively discharged. Therefore, we agree with the district court that no additional discovery was required before ruling on Firestone's motion for summary judgment."

(e) *Nidds v. Schindler Elevator Corp.*, 113 F.3d 920, 921 (9th Cir. 1996):

> "'We review a district court's denial of a [Fed.R.Civ.P. 56(f)] request for further discovery by a party opposing summary judgment for abuse of discretion.' *Conkel v. Jeong*, 73 F.3d 909, 914 (9th Cir. 1995), *cert. denied*, ____U.S.____, 117 S.Ct. 56, 136 L.Ed.2d 19 (1996). The burden is on the

party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, *id.*, and that it would prevent summary judgment. *Qualls v. Blue Cross of California, Inc., 22 F.3d 839, 844 (9th Cir.1994). 'Moreover, the district court does not abuse its discretion by denying further discovery if the movant has failed diligently to pursue discovery in the past.' Conkle*, 73 F.3d at 914 (internal quotation omitted)."

(f) *Boling v. Romer*, 101 F.3d 1336, 1339 (Footnote 3) (10 Cir. 1996):

"In any event, plaintiff's argument is foreclosed by his failure to submit to the district court an affidavit, pursuant to Fed.R.Civ.P. 56(f), specifically indicating that he was unable to oppose the summary judgment motion without discovery. *See, e.g., International Surplus Lines Ins. Co. v. Wyoming Coal Ref. Sys., Inc.*, 52 F.3d 901, 905 (10th Cir. 1995)."

(g) *Simmons Oil Corp. v. Tesoro Petroleum Corp.*, 86 F.3d 1138, 1144 (Fed. Cir. 1996):

"In moving for relief under Rule 56(f), a party must demonstrate specifically 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.' *Willmar Poultry Co. v. Morton-Norwich Prods., Inc.*, 520 F.2d 289, 297 (8th Cir.1975), *cert. denied*, 424 U.S. 915, 96 S.Ct. 1116, 47 L.Ed.2d 320 (1976). The party 'may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts.' *Securities & Exchange Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896, 901

(5th Cir. 1980), *cert. denied*, 449 U.S. 1082, 101 S.Ct. 866, 66 L.Ed.2d 806 (1981). The rule does not require clairvoyance on the part of the moving party, *Emplanar, Inc. v. Marsh*, 11 F.3d 1284, 1292 (5th Cir.), *cert. denied*,____U.S.____, 115 S.Ct. 312, 130 L.Ed.2d 275 (1994), but the movant is 'required to state with some precision the materials he hope[s] to obtain with further discovery, and exactly how he expect[s] those materials would help him in opposing summary judgment.' 0112Krim v. BancTexas Group, Inc., 0111989 F.2d 1435, 1443 (5th Cir. 1993). It is not enough simply to assert, a' la Wilkins Micawber, that 'something will turn up.' ''

3. RULE 1006 OF FEDERAL RULES OF EVIDENCE AND RULE REQUIRING OBJECTIONS OR MOTIONS TO STRIKE TO BE MADE IN DISTRICT COURTS:

Although the Court of Appeals does not address the questions embodied in the Federal Rules of Evidence and the related questions requiring objections or motions to strike to be filed in district courts rather than mere objections to be made via brief and argument for the first time on appeal as the EMS employees did in this case, nevertheless, by bypassing these issues in its opinion, the Court of Appeals has reached a result contrary to results in other circuits on fundamental evidentiary rules. The silence of the Court of Appeals in addressing these matters does not detract from the necessity of exercising supervisory power because the Eleventh Circuit in reality has departed from the following rulings in other circuits:

(a) *Davis v. Sears, Roebuck and Company*, 708 F.2d 862 (1) (1st Cir. 1983):

> "If a party submits an inadmissible affidavit with a motion to dismiss, thus requiring that motion be treated as one for summary judgment, and opposing party does not move to have affidavit stricken, any objections to its consideration are deemed to have been waived and affidavit may properly be considered by court when ruling on motion."

(b) *Decintio v. Westchester County Medical Center,* 821 F.2d 111 (2) (2nd Cir. 1987), *cert. den.*, 484 U.S. 965:

> "Failure to complain to district court about unsworn nature of attachments to former employee's affidavit in opposition to motion for summary judgment resulted in waiver of objection."

(c) *U.S. v. Strissel,* 920 F.2d 1162, 1163, 1164 (4th Cir. 1990):

> "The appellant is wrong. This issue actually has not been addressed previously in this Circuit. However, a reading of the plain language of Federal Rule of Evidence 1006 makes it clear that there is no requirement that all of the voluminous evidence supporting a chart or graph be introduced into evidence as a precondition to the introduction of that chart or graph. Rule 1006 states:
>
> > The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court *may order* that they be produced in court.
>
> (Emphasis added.) The last sentence of this rule

indicates that the trial judge may order the underlying documentation to be produced in court in his discretion. Since this decision is within the judge's discretion, the rule does not require that the underlying evidence be introduced into evidence in all cases. Those two positions are mutually exclusive. *See* J. Weinstein & M. Burger, *Weinstein's Evidence*, § 1006[1], p. 1006-5 (1989).

The first sentence of Rule 1006 infers the same result. The rule's language recognizes that it often takes a great deal of court time to introduce a legion of documents to establish a single point. As the Advisory Committee notes indicate, it would be a grueling waste of time to examine all of the underlying evidence in court, and hence charts and summaries are permitted within the judge's discretion. *See also Weinstein's Evidence*, at 1006-2-3. Weinstein cites numerous cases for this proposition. *See id.* at p. 1006-3, n.2 (1989 supp.)."

(d) *McCloud River R. Co. v. Sabine River Forest*, 735 F.2d 879 (1) (5th Cir. 1984):

"Nonmoving party waived right to raise on appeal issue whether affidavit filed in support of motion for summary judgment was timely where nonmovant neither moved to strike the affidavit nor raised objection to consideration of the affidavit, and similarly waived issue whether unsworn affidavit filed in support of the motion rendered the motion deficient by failing to make timely objection in district court."

(e) *Klingman v. National Indemnity Co.*, 317 F.2d 850, 854 (7th Cir. 1963):

"The thrust of Rule 56(e) is that the affidavit

'shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' It is settled law that testimony to which no objection is made may be considered by the trier of fact. We conclude that an analogous rule is applicable here. On a motion for summary judgment, if no objection is made to an affidavit which is objectionable under Rule 56(e), the affidavit may be considered by the court in ruling on the motion."

(f) *Noblett v. General Electric Credit Corporation,* 400 F.2d 442, 445 (10th Cir. 1968), *cert. den.*, 393 U.S. 935:

"It was said long ago and observed in various applications since that 'Errors as a rule to be reviewable on appeal must be definitely and timely called to the attention of the trial court in order to afford a fair opportunity for it to pass upon the matter to correct its own errors, if any.' *Scritchfield v. Kennedy,* 103 F.2d 467 (10th Cir. 1939). An affidavit that does not measure up to the standards of 56(e) is subject to a motion to strike; and formal defects are waived in the absence of a motion or other objection. 6 *Moore's Federal Practice* § 56.22(1) p. 2817; 3 Barron and Holtzoff, Federal Practice and Procedure § 1237, p. 171; *Auto Drive-Away Company of Hialeah, Inc. v. I.C.C.*, 360 F.2d 446 (5th Cir. 1966); United States for Use and Benefit of *Austin v. Western Electric Co.*, 337 F.2d 568 (9th Cir. 1964); *Klingman v. National Indemnity Company,* 317 F.2d 850 (7th Cir. 1963) Cf. *Wagoner v. Mountain Savings and Loan Association,* 311 F.2d 403 (10th Cir. 1962)."

4. THE FINDINGS OF THE DISTRICT COURT AND THE UNDISPUTED FACTUAL RECORD SHOW THAT THE CITY HAS MET ITS BURDEN ON SUMMARY JUDGMENT OF PROVING THAT THE EMS EMPLOYEES ARE PROPERLY CLASSIFIED FOR THE PARTIAL EXEMPTION ALLOWED BY 29 U.S.C § 207(k):

By failing to affirm the District Court without further proceedings, the Eleventh Circuit reached a result contrary to the results reached in similar FLSA cases in the following circuits:

(a) *Bond v. City of Jackson,* 939 F.2d 285 (5th Cir. 1991):

> "Paramedics employed by emergency medical service (EMS) division of city fire department were employed in 'fire protection activities' within meaning of Fair Labor Standards Act's (FLSA) limited exemption from overtime compensation requirements, in light of evidence that EMS ambulances were regularly dispatched to accidents and that employees received training in the rescue of fire and accident victims, even though employees did not routinely perform fire rescues; employees were trained to rescue within meaning of Department of Labor regulations where they had knowledge of basic life-saving procedures and life-support procedures, even if they did not routinely perform any or all of those procedures."

(b) *Justice v. Metropolitan Government of Nashville,* 4 F.3d 1387, 1395, 1396, 1399 (6th Cir. 1993):

> "In fact, Representative Quie clearly states that this exemption 'is intended to cover those employees directly employed by a public agency who are

engaged in rescue or ambulance activities which are substantially related to fire protection or law enforcement activities.' 120 Cong.Rec. 8598 (1974)." (Footnote 2 containing a "fuller text of the colloquy" is omitted.) 4 F.3d 1387, 1395, 1396

"Pursuant to Section 553.212, we must next determine what qualifies as nonexempt activities. In determining what are nonexempt versus exempt activities, we follow the language in Section 553.215 and the Eleventh Circuit in *O'Neal*."

. . .

"It held that waiting to be dispatched for fire or lawrelated activities would be exempt activities, however. *See O'Neal*, 980 F.2d at 682." 4 F.3d 1387, 1399

(c) *Christian v. City of Gladstone, Mo.*, 108 F.3d 929, 934 8th Cir. 1977):

"The better approach is that adopted by the Fourth Circuit in *Schmidt* because it fits the broad language used by Congress in extending the overtime exception to 'any employee in fire protection activities.' The legislative history indicates that Congress recognized that employees in fire protection and law enforcement activities regularly work more than forty hours each week, but believed 'the actual impact on State and local governments . . . of a 40 hour standard will be virtually nonexistent' because of the overtime exception in *8* 207(k). H.R.Rep. No. 93-913 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811, 2838; *see also* S.Rep. No. 93 690, at 24 (1974). It also shows an intent to include paramedic and rescue work that is substantially related to fire protection within the term of 'fire

'fire protection activities' in § 207(k): —'[The statutory exception] is intended to cover those employees directly employed by a public agency who are engaged in rescue or ambulance activities which are substantially related to fire protection or law enforcement activities.' 120 Cong.Rec. 8598 (1974); *see also Justice v. Metropolitan Gov't of Nashville*, 4 F.3d 1387, 1395-96 & n.2 (6th Cir.1993) (discussing legislative intent behind exemption; *Horan v. King County*, 740 F.Supp. 1471, 1475-78 & n. 3 (W.D.Wash. 1990) (same). Based on this legislative history, every circuit which has considered the issue has concluded that ambulance and rescue service personnel could thus be within the term 'employee in fire protection activities.' *See, e.g., Alex*, 29 F.3d at 1239 (7th Cir.); *Justice*, 4 F.3d at 1393 (6th Cir.): *O'Neal*, 980 F.2d at 677 (11th Cir.); *Bond* 939 F.2d at 288 (5th Cir.).

CONCLUSION

Standards for disposition of motions for summary judgment and interpretation of the Federal Rules of Evidence were recently addressed in *General Electric Co. v. Joiner*, 118 S.Ct. 512 (December 15, 1997), a case which provides a persuasive analogy for the case at bar. There the Supreme Court reversed the Eleventh Circuit's reversal of the District Court's decision to exclude expert scientific evidence, a decision which must be reviewed on an abuse of discretion standard. The City's point is made in the last sentence of the first syllabus:

> "In applying an overly 'stringent' standard, the Eleventh Circuit failed to give the trial court the deference that is the hallmark of abuse of discretion review."

That is exactly what the Eleventh Circuit has done in the case at bar, except that the error is even worse. For here the Eleventh Circuit has ignored the Federal Rules of Evidence altogether, not to speak of its disregard for an undisputed factual record. The Eleventh Circuit's failure to afford the District Court proper deference in both evidentiary and discovery matters and the Eleventh Circuit's failure to follow the summary judgment procedure contemplated in the *Celotex* trio calls for issuance of a writ of certiorari and reversal to correct this aberration from the standards set by the Supreme Court and other circuits.

Respectfully submitted this ____ day of March, 1998.

Eugene Hardwick Polleys, Jr.,
City Attorney
P. O. Box 1340
Columbus, Georgia 31902
(706) 653-4025
GA STATE BAR NO. 583000

ATTORNEY FOR COLUMBUS, GEORGIA

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

DONALD R. JONES, JAMES DUNNAVANT, and BRENT S. MORRIS, Individually and on behalf of all other similarly situated,	*	FILED U.S. DISTRICT COURT MIDDLE GEORGIA 95APR22 PM 3:57 /s/ Carolyn Fryer Deputy Clerk
Plaintiffs	*	CASE NO.
vs.	*	4:95-cv-98 (JRE)
THE CITY OF COLUMBUS,	*	
Defendant	*	

ORDER ON PLAINTIFFS' MOTION TO HOLD IN ABEYANCE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In the case above identified the Defendant filed a motion for summary judgment on November 20, 1995. The Plaintiffs did not make a response to the Defendant's motion for summary judgment, but instead, on December 21, 1995, filed a motion to "hold in abeyance the Defendant's motion for summary judgment," which amounted to a request for an indefinite delay in any ruling on the Defendant's motion. The Defendant opposes the suggested delay.

Upon consideration the Court observes that there are established timetables for consideration of motions for summary judgment and concludes that in this case there is no good cause shown for delay in considering the Defendant's motion. Plaintiffs' motion to hold in abeyance is denied

IT IS SO ORDERED. this 22nd day of April, 1996.

/s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

DONALD R. JONES, JAMES DUNNAVANT, and BRENT S. MORRIS, Individually and on behalf of others similarly situated,

Plaintiffs

vs.

THE CITY OF COLUMBUS,

Defendant

FILED
U.S. DISTRICT COURT
MIDDLE GEORGIA
96 APR 22 PM 3:57
/s/ Carolyn Fryer
DEPUTY CLERK

CASE NO.
4:95-cv-98 (JRE)

ORDER ON DEFENDANT'S OPPOSITION TO NOTICE OF DEPOSITIONS

In the case above identified the Defendant filed a motion for summary judgment and Plaintiffs filed a motion to delay consideration of the Defendant's motion and thereafter served notice of the taking of some depositions.

Since the Court entered an order denying the Plaintiffs' motion to enlarge the time within which they might file a response to the Defendant's motion for summary judgment, it follows that since these late depositions could not be used in response to the Defendant's motion there would be no point in taking them. Accordingly, the Defendant's objection to the taking of the depositions referred to is sustained.

IT IS SO ORDERED, this 22nd day of April, 1996.

/s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

DONALD R. JONES, JAMES DUNNAVANT, and BRENT S. MORRIS, Individually and on behalf of all other similarly situated, Plaintiffs	)	Case No. 4:95-cv-98 (JRE)
vs.	)	FILED 3:45 p.m. MAY 2, 1996
THE CITY OF COLUMBUS, Defendant	)	/s/ illegible DEPUTY CLERK U.S. DISTRICT COURT MIDDLE DISTRICT OF GEORGIA

MEMORANDUM OPINION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Plaintiffs in the action above identified are current or former employees of the Emergency Medical Services Division of the Department of Public Safety in the City of Columbus, Georgia, and they have brought this action against the City, as the employer of the Plaintiffs, for what the Plaintiffs allege to be violations of the Fair Labor Standard Act of 1938, as amended, 29 U.S.C. § 201, et seq. (hereinafter the "FLSA" or the "Act"), arising from the alleged failure of the Defendant to properly compensate them for overtime work. The Defendant denies any liability to the Plaintiffs, pointing out that the services of the Columbus Emergency Medical Services are substantially related to fire fighting or law enforcement activities in that the Columbus EMTs have received training in the rescue of fire, crime and accident victims or fire fighters or law enforcement personnel who are injured in the performance of their respective duties and in that the Columbus EMTs are regularly dispatched to fires, crime

scenes, riots, natural disasters, and accidents as contemplated in 29 C.F.R. § 553.215.

The Defendant also contends that, counting the time spent awaiting calls at stations, the Columbus EMTs spent at least 80% of their work time on either law enforcement or fire protection related activities and are thus subject to the exemptions of 20 U.S.C. § 207(k) as contemplated by 29 C.F.R. § 553.212 and that the majority of the work time of Columbus EMTs which is spent on related law enforcement or fire protection activities is spent on fire protection activities, and they thus are partially exempt from FLSA overtime requirements applicable to fire fighters as contemplated by 29 C.F.R. § 553.213.

The Defendant has filed a motion for summary judgment and a number of affidavits and a brief in support of the motion. In response the Plaintiffs did not file any opposing affidavits but did file a motion seeking an indefinite extension of time within which they might respond to the Defendant's motion. The Defendant objected to the extension requested and upon consideration the Court denied the Plaintiffs' motion for an indefinite extension. Thus, the Plaintiffs simply relied on the assertions made by them in their complaint as their response to the Defendant's motion.

Rule 56(c) of the Federal Rules of Civil Procedure provides that "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitiled to a judgment as a matter of law." In *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986), it was held that "the moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed

to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." This application of Rule 56(c) has a direct adverse impact upon the Plaintiffs in this case who have, in effect, made no factual response whatsoever to the Defendant's motion for summary judgment on a single element of their FLSA claim but rather have contented themselves with a counterargument which is unsupported by any evidence. They are in the same position that they would be in if the case had been brought on for trial and they had rested their case without producing any evidence in support of their allegations, which would subject them to a directed verdict. Indeed, in the *Celotex* opinion it is stated that "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . ." 477 U.S. 317, 323.

In *Justice v. Metropolitan Government of Nashville, Davidson County, Tennessee,* 4 F.3d 1387 (6th Cir. 1993), it was recognized that it was clearly the intent of Congress to treat emergency medical services employees as fire fighters or police officers when they performed substantially related activities, and 29 C.F.R. § 553.213 recognizes that some employees have duel fire and police functions and that the maximum hours allowed before overtime is due differs for the two separate functions. Therefore, that section provides that the determination of whether or not an employee falls under the police or fire column of hours as set out in 29 C.F.R. § 553.230 depends upon "the activity in which the employee spends the majority of work time during the work period." Application of this regulation to EMS employees was made by the Eleventh Circuit Court of Appeals in *Wouters v. Martin County,* 9 F.3d 924, 930 (1993). There it was held that the proper exemption category for ambulance and rescue personnel, like that of public safety officers, depends on the type of activity in which these employees spend most of their time.

The calculation of man hours reflected in the affidavit of the EMS Chief in this case and the work analyses indicated by the affidavit of the Assistant EMS Chief clearly show that the City of Columbus has properly arrived at the conclusion that its EMS Department spends the majority of its exempt time on fire protection and that the overtime hours applicable to fire fighters governs the Plaintiffs' compensation.

In light of the foregoing, the Court is led to the conclusion that there is not controversy concerning the facts material to a resolution of this matter and that the Defendant's motion for summary judgment should be and the same is hereby sustained and an appropriate judgment will be entered.

IT IS SO ORDERED, this 2nd day of May, 1996.

/s/J. Robert Elliott

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

DONALD R. JONES, JAMES DUNNAVANT, and BRENT S. MORRIS, Individually and on behalf of all other similarly situated,

Plaintiffs

vs.

THE CITY OF COLUMBUS,

Defendant

CASE No. 4:95-cv-98 (JRE)

Filed 3:50 PM
MAY 2, 1996
/s/ C.V. Palma
DEPUTY CLERK
U.S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

JUDGMENT

Pursuant to the Court's Memorandum Opinion and Order dated and filed on May 2, 1996, and for the reasons contained therein, the Defendant's motion for summary judgment is sustained and, Judgment is entered for the Defendant.

This 2nd day of May, 1996.

GREGORY J. LEONARD, CLERK
by: /s/ C. V. Palmer
Deputy Clerk

ENTERED ON DOCKET
5-2-1996
Gregory J. Leonard, Clerk
by /s/ C.V. Palmer
Deputy Clerk

APPENDIX D

Donald R. JONES, James Dunnavant, Brent S. Morris, Individually and on behalf of all other similarly situated, Plaintiffs-Appellants,

v.

CITY OF COLUMBUS, GEORGIA, Defendant-Appellee.

No. 96-8647

United States Court of Appeals,
Eleventh Circuit.

August 26, 1997.

A. Lee Parks, Kirwan, Parks, Chesin & Remar, P.C., Harlan S. Miller, Atlanta GA, for Plaintiffs-Appellants.

Eugene Hardwick Polleys, Jr., City Attorney, Columbus, GA, for Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before EDMONSON, Circuit Judge, and KRAVITCH and HENDERSON, Senior Circuit Judges.

PER CURIAM:

The plaintiffs-appellants filed this action premised on the Fair Labor Standards Act alleging that the City of Columbus, Georgia ("City") had failed to compensate them for all the overtime hours they worked as employoees of the Emergency Medical Services ("EMS") Division of the Department of Public Safety of the City. The district court granted the City's motion for summary judgment and the plaintiffs filed this appeal from the final judgment. They contend that the district

court erred in considering themotion for summary judgment before they had an opportunity to complete discovery and in granting the motion without determining whether the City had met its burden of showing that it was entitled to judgment as a matter of law. For the reasons that follow, we vacate the district court's summary judgment and remand the case for further proceedings.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

The plaintiffs in this action are approximately 40 present and former employees of the EMS Division. The division responds to emergency calls from citizens throughout Columbus and Muscogee County. It has eight to ten ambulances available at any given time, half of which are housed in fire stations and half in freestanding EMS buildings. EMS employees work shifts of 24 hours on duty and 48 hours off duty and average 56 hours per week over each four-week pay period. They are compensated on the same basis as employees of the Fire Services Division and receive overtime pay only for hours worked in excess of 53 per week.

In July, 1995, the plaintiffs filed this action pursuant to the Fair Labor Standards Act[1] ("FLSA"), seeking overtime compensation for all hours worked over 40 per week. In its answer the City contended, *inter alia,* that it was entitled to a partial exemption from the overtime requirements of the FLSA

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[1] 29 U.S.C. §§ 201 219. The statute provides that, generally, "no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. 207(a)(1).

because the duties of EMS personnel are substantially related to firefighting or law enforcement activities.[2] In September, 1995, prior to the entry of any scheduling or discovery order, the plaintiffs served their first request for the production of documents and first interrogatories to the City. Due to the nature of the issues involved, the plaintiffs needed to examine thousands of pages of payroll records and reports generated relating to each ambulance trip. In its response filed on October 4, 1995, the City noted that some of the requested documents were in preparation and would be attached to its forthcoming motion for summar judgment.

The City moved for summary judgment on November 20, 1995, relying on the affidavits of David W. Arrington, Chief of the EMS Department, Robert T. Futrell, Assistant Chief of the EMS Department, Stan Swiney, Director of the Columbus 911 Center, and James R. Bloodworth, Training/Quality Improvement Officer in the EMS Department. A "spread sheet" purporting to analyze and categorize the work of the plaintiffs and other EMS employees was attached to Arrington's affidavit. The affidavits referred to, and the spread sheet was

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[2] No public agency shall be deeed to have violated subsectin (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities . . . id

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours . . . in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed. 29 U.S.C. § 207(k).

based on, extensive documentary materials which were not attached to or furnished in support of the affidavits and which had been requested by the plaintiffs. The City's principal contention was that it was entitled to a partial exemption from the overtime requirements because the plaintiffs' work was substantially related to fire or police work in that (1) EMS personnel had received training in the rescue of fire, crime and accident victims as well as firefighters or law enforcement personnel injured in the performance of their duties and (2) EMS personnel were regularly dispatched to fires, crime scenes, riots, natural disasters and accidents.

On December 20, 1995, the plaintiffs served a second request for the production of documents, specifically seeking the documents referred to in the affidavits offered in support of the City's motion for summary judgment, including all records with respect to emergency calls received by the City's 911 Center, all "Monthly Manpower Reports" drafted by Assistant Chief Futrell and all individual shift reports prepared by EMS supervisors. The plaintiffs also filed a motion to defer ruling on the motion for summary judgment pending the completion of discovery. The plaintiffs noted that no discovery scheduling order had been requested by the court pursuant to Local Rule 4.1[3] and, as a result, no specific discovery period had been set by the court or agreed to by the parties.

On January 16, 1996, the plaintiffs noticed the depositions of Arrington, Futrell, Bloodworth and Swiney, among others.

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[3] Local Rule 4.1 of the Middle District of Georgia ses forth the discovery procedure to be followed in a civil case. After the filing of responsive pleadings, "the court by letter may direct all counsel to confer in person . . . to develop a proposed discovery plan. The contents of the discovery plan will be described in the court's letter. Within ten (10) days after the meeting, plaintiff's counsel shall submit to the court a proposed, combined order detailing the reslts of the meeting and the plan for discovery."

The City moved for a protective order to prohibit the taking of the depositions, contending that the plaintiffs were attempting to circumvent the time limits for responding to the City's motion for summary judgment.[4] The plaintiffs filed a motion to compel the City to proceed with the depositions, which was opposed by the City. There was no further activity until April 22, 1996, when the district court denied the plaintiffs' motion to hold the summary judgment motion in abeyance pending the completion of discovery, finding that there was no good reason for delaying consideration of the motion for summary judgment. By separate order, the court granted the City's motion for protective order, thereby preventing the plaintiffs from proceeding with the depositions, on the ground that the plaintiffs could not use these "late" depositions in responding to the City's motion. While the plaintiffs' motion for reconsideration of those orders was pending, the district court granted the City's motion for summary judgment on May 2, 1996. The plaintiffs filed this timely appeal from the final judgment.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*. *Wouthers v. Martin County, Florida*, 9 F.3d 924, 928 (11th Cir.1993). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The movant carries the burden of estab-

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[4] Local Rule 3.2 provides that, in responding to motions generally, the respondent shall have 20 days after service of the movant's motion and brief. There is no separate provision for summary judgment or other dispositive motions.

lishing the absence ofa genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). We review the record and all inferences therefrom in the light most favorable to the nonmoving party. *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir.1992). The district court's decisions concerning discovery are reviewed under an abuse of discretion standard. *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 542 (11th Cir.1996).

III. DISCUSSION

A. Applicable Substantive Law

The FSLA requires that an employer must generally compensate an employee at the overtime rate for all work performed in excess of 40 hours per week. 29 U.S.C. § 207(a)(1). The statute does permit a partial exemption, however, for employees engaged in law enforcement and fire protection. 29 U.S.C. § 207(k). The regulations permit local jurisdictions to treat EMS personnel like firefighting or police personnel if they "form an integral part of the public agency's fire protection [or law enforcement] activities," 29 C.F.R. § 553.210(a) & .211(b), or if "their services are substantially related to firefighting or law enforcement activities," 29 C.F.R. § 553.215(a).

The City has not maintained that its EMS personnel form an integral part of its fire protection or law enforcement agencies; it has only contended that their services are substantially related to firefighting or law enforcement activities. Under the regulations, the duties of EMS personnel are substantially related to such activities if they

> 1) . . . have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel in the performance of their

> respective duties, and 2) . . . are regularly dispatched to fires, crime scenes, riots, natural disasters, and accidents.

29 C.F.R. § 553.215(a); *see O'Neal v. Barrow County Board of Commissioners*, 980 F.2d 674, 677 (11th Cir.1993).

In this case, it is conceded that the City's EMS personnel have received training in the rescue of fire, crime and accident victims. Therefore, the only disputed issue is whether the City's EMS personnel are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. In resolving this issue, the district court must first determine which categories of dispatches in the records kept by the employer should be considered exempt. *See O'Neal*, 980 F.2d at 678-79. Then, in ascertaining whether the dispatches to fires, crimes and automobile accidents are regular, the court should look to: 1) the percentage of the EMS Division's total calls that are dispatches to fires, crimes, and automobile accidents; 2) the percentage of total EMS man-hours spent responding to such dispatches; and 3) the percentage of all fires, automobile accidents and police calls to which EMS personnel are dispatched. *Id.* at 679.

Even if a local government's EMS personnel satisfy the "substantially related" test, their employer may still not claim the exemption if the EMS personnel spend more than 20% of their time on non-exempt activities. *See Wouters*, 9 F3d at 929; *O'Neal*, 980 F.2d at 680-82. Under a regulation known colloquially as the "80/20 rule,"

> [e]mployees engaged in fire protection or law enforcement activities . . . may also engaged in some nonexmempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement actiities. . . . The performance

> of such nonexempt work will not defeat [the § 7(k) exemption] unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period.

29 C.F.R. § 553.212(a). While categorizing activities as exempt or nonexempt is sometimes difficult, this court has held that hours spent on medical emergency dispatches, patient transfers and accident scenes unrelated to automobiles are nonexempt. *Wouters*, 9 F.3d at 932. The most critical question may be deciding how to classify those hours the EMS personnel spend at the workplace but are not responding to any calls. *See O'Neal*, 980 F.2d at 681.

Finally, this exemption from the general FLSA requirement that overtime compensation be paid must be narrowly construed against the employer, who bears the burden of proving its entitlement to the exemption. *Wouters*, 9 F.3d at 929; *O'Neal*, 980 F.2d at 677. To defeat an employee suit, "The employer must demonstrate entitlement to an exemption under either the law enforcement or firefighter provisions, and also that the exempt employees work at least 80% of the time in related activities." *Wouters*, 9 F.3d at 982.

B. Plaintiffs' Contentions.

The plaintiffs argue tha the district court erred in deciding the City's summary judgment motion prior to allowing them to complete discovery, including the review of thousands of pages of essential documents and conducting properly noticed depositions. In response, the City alleges that the plaintiffs have not made the "showing necessary for proffering further evidence to counteract defendants motion for osummary judgment. . . ." By this, the City apparently means that the plaintiffs left themselves open to summary adjudication by

not properly responding to its motion. This answer fails to rebut the plaintiffs' charge that they were barred by the court from completing the discovery necessary to adequately respond to the City's motion.

The law in this circuit is clear; the party opposing a motion for summary judgment should be permitted an adequate opportunity to complete discovery prior to consideration of the motion. *See, e.g., Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865, 870-71 (11th Cir.1988); *WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir.1988). In *Snook*, this court stated:

> The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits. . . . If the documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials. . . . Generally summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests.

859 F.2d at 870 (citations omitted). In that case, the district court had granted the defendants' motion for summary judgment without ruling on the plaintiffs' motion to compel discovery. This court reversed the judgment and remanded the case for reconsideration of the motion for summary judgment or an adequate record.

In this case as well, the district court summarily denied the

plaintiff' motion to hold the summary judgment motion in abeyance pending the completion of discovery and granted the City's motion for a protective order. As a result, the plaintiffs never had the opportunity to examine all of the documents they had requested or to depose the city officials whose affidavits were offered in support of the motion for summary judgment. Accordingly, we conclude that the district court abused its discretion in deciding the summary judgment motion even though it had allowed the City to block the plaintiffs' efforts to gain the information they needed through the normal discovery process.

The plaintiffs also assert that the procedure followed by the district court in deciding the summary judgment motion was flawed because the court did not first determine whether the City as movant had satisfied its initial summary judgment burden before inquiring whether the plaintiffs had properly responded to the City's motion. According to the plaintiffs, it was necessary for the district court to first determine whether the City had shown that there was no genuine dispute of fact on the questions on which it would bear the burden of proof at trial, i.e., whether EMS personnel are regularly dispatched to certain emergency scenes and whether EMS personnel spend at least 80% of their work time on fire fighting and law enforcement activities. Further, since the City did not establish either of these elements necessary to prevail on its claimed exemption from the FLSA, the district court erred in granting the City's motion for summary judgment. Before us, the City simply states that the plaintiffs are properly classified as having duties substantially related to firefighting and are thus subject to the partial exemption from overtime provisions applicable to firefighters.

In *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir.1991), a panel of this court reversed the entry of

summary judgment because the district court had apparently misapplied the burdens on the movant and non-movant in the summary judgment context. Noting that the district court's opinion had discussed only what burden the plaintiffs had and why they had not met it, this court surmised that the district court had changed the summary judgment procedure to place the burden on the party who would have the burden at trial, the plaintiffs. *Id.* at 608. The court stated that the correct procedure is for the district court to determine if the moving party has met its initial burden of demonstrating the absence of any disputes of material fact and its entitlement to judgment as a matter of law. *Id.* at 609.

It appears the district court made the same error in this case. The court did not inquire whether the City had met its initial burden, but focused on whether the plaintiffs had met their burden in opposing the motion. According to the district court, the

> application of Rule 56(c) has a direct adverse impact upon the Plaintiffs in this case who have, in effect, made no factual response whatsoever to the Defendant's motion for summary judgment on a single element of their FLSA claim but rather have contented themselves with a counter-argument which is unsupported by any evidence. They are in the same position that they would be in if the case had been brought on for trial and they had rested their case without producing any evidence in support of their allegations, which would subject them to a directed verdict.

(Order dated May 2, 1996, at 3). As in *Clark*, this language improperly shifts the summary judgment burden from the moving party to tne non-moving party.

Turning to the merits, the district court's consideration of the evidence offered in support of the City's motion was limited to a single sentence in its brief order:

> The calculation of man hours reflected in the affidavit of the EMS Chief in this case and the work analyses indicated by the affidavit of the Assistant EMS Chief clearly show that the City of Columbus has properly arrived at the conclusion that its EMS Department spends the majority of its exempt time on fire protection and that the overtime hours applicable to fire fighters governs the Plaintiffs' compensation.

(Order dated May 2, 1996, at 4). This finding may support the conclusion that EMS personnel are more like firefighters than law enforcement personnel. It is not, however, a basis for properly resolving the dispositive legal issues in this case, whether EMS personnel are regularly dispatched to certain emergencies and whether they spend at least 80% of their time on firefighting and law enforcement activities.

IV. CONCLUSION

On remand, the district court should allow the plaintiffs a reasonable period to complete discovery to enable them to properly respond to the City's motion for summary judgment. The court may then conduct further proceedings to determine whether the City has met its burden of proving that the plaintiffs are regularly dispatched to firefighting or law enforcement activities. If so, the district court must further consider whether the plaintiffs spend more than 20% of their working time in nonexmpt activities. Accordingly, the district court's grant of summary judgment to the City is VACATED and

the case is REMANDED for further proceedings consistent with this opinion.

VACATED and REMANDED.

APPENDIX E

United States Court of Appeals

For the Eleventh Circuit

No. 96-8647

D.C. Docket No. 4:95-CV-98

FILED
U.S. Court of Appeals
Eleventh Circuit
AUG 26, 1997
MIGUEL J. CORTEZ
CLERK

DONALD R. JONES, JAMES DUNNAVANT
BRENT S. MORRIS, Individually and
on behalf of all others similarly situated,
Plaintiffs-Appellants,

versus

CITY OF COLUMBUA, GEORGIA,
Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

Before EDMONDSON, Circuit Judge, and KRAVITCH and HENDERSON, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby VACATED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that the defendant-appellee pay plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

Entered August 26, 1997
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 1/6/98

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8647

DONALD R. JONES,
JAMES DUNNAVANT,
BRENT S. MORRIS, Individually
and on behalf of all others
similarly situated,

Plaintiffs-Appellants,

versus

CITY OF COLUMBUS, GEORGIA,

Defendant-Appellee.

FILED
U.S.COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 22 1997
THOMAS K. KAHN
CLERK

On Appeal from the United States District Court
for the Middle District of Georgia

BEFORE: EDMONSON, Circuit Judge, KRAVITCH and HENDERSON, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the appellee, City of Columbus, Georgia, is denied.

ENTERED FOR THE COURT:
/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

ORD 41

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8647

DONALD R. JONES,
JAMES DUNNAVANT,
BRENT S. MORRIS, Individually
and on behalf of all others
similarly situated,

Plaintiffs-Appellants

versus

CITY OF COLUMBUS, GEORGIA,

Defendant-Appellee.

FILED
U.S.COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 22 1997
THOMAS K. KAHN
CLERK

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion_____, 11th Cir., 19____, ____f.2d____).

Before: EDMONSON, Circuit Judge, KRAVITCH and HENDERSON, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5e), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmonson
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)